



THE COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF PUBLIC UTILITIES

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May 10, 2023

VIA E-MAIL

Shonda D. Green, Secretary
Department of Telecommunications & Cable
1000 Washington St., Suite 600
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RE: D.T.C. 22-4 – CRC Communications LLC d/b/a OTELCO v. Massachusetts
Electric Company and Verizon New England Inc.

Dear Secretary Green:

On February 21, 2023, CRC Communications LLC d/b/a OTELCO (“OTELCO” or “Company”) submitted a Motion for Enforcement (“Post-Order Motion”) of the final Order issued on October 11, 2022, by the Department of Telecommunications and Cable (“DTC”) in the above-captioned matter. On April 4, 2023, the Department of Public Utilities (“DPU”), Massachusetts Electric Company d/b/a/ National Grid (“National Grid”), and Verizon New England, Inc. (“Verizon”) each submitted comments opposing the Post-Order Motion on procedural grounds. National Grid and Verizon also each disputed assertions made by OTELCO in its Motion.

On April 18, 2023, OTELCO submitted a new motion for leave to file a reply to the comments submitted by the DPU, National Grid, and Verizon and additional evidentiary materials. On April 26, 2023, the DTC established a May 10, 2023 deadline allowing parties to file a sur-reply specific to two issues: (1) if objecting to OTELCO’s request to admit new evidence in this proceeding, to explain why the evidence should not be admitted; and (2) if OTELCO’s evidence is admitted, to explain how the evidence should be evaluated

by the DTC regarding pole owners' assertion that additional preconstruction surveys are needed before OTELCO's attachment applications can proceed. D.T.C. 22-4, Hearing Officer E-Mail Memo (April 26, 2023).

Regarding the DTC's first inquiry, well-established administrative practice for our agencies and basic due process considerations require denial of a request to admit new evidence on a closed record involving an issue that was not adjudicated by the parties in the underlying proceeding. Further, admittance of any new evidence at this stage of the proceeding, nearly seven months after issuance of the final Order, would be highly irregular and improper and likely a violation of the State Administrative Procedure Act, G.L. c. 30A. See Vitale v. Planning Bd. Of Newburyport, 10 Mass.App.Ct. 483, 487 (1980) ("[a]n administrative agency may not make a decision on the basis of evidence obtained after the close of the administrative proceeding"). As further support for our position, the DPU incorporates by reference the DPU's April 4, 2023 comments.

Moreover, the DPU and DTC's shared administrative practice and precedent supports rejecting OTELCO's motions. Our agencies have long determined that a party's presentation of extra-record evidence to the fact-finder after the record has closed is an unacceptable tactic that is potentially prejudicial to the rights of other parties even when the evidence is excluded. See Boston Edison Company and Commonwealth Electric Company, D.T.E. 04-85, at 9 (2005); New England Telephone and Telegraph Company, D.P.U. 94-50, at 59 (1995); Boston Gas Company, D.P.U. 88-67 (Phase II) at 7 (1989) ("Boston Gas"). Our agencies have stated that the objectives of the procedure set forth in Boston Gas are to eliminate unfair prejudice where a party does not have the opportunity to anticipate the offering of evidence and to prevent the potential prejudice that results from the fact-finder's exposure to information before a decision is made to reopen the record. See D.P.U. 94-50, at 59; Berkshire Gas Company, D.P.U. 90-121, at 12-14 (1990); Bay State Gas Company, D.P.U. 89-81, at 47-48 (1989) (filing of updated information late in the suspension period increases the risk of decision-making on a record insufficiently tested through litigation and review); Boston Edison Company, D.P.U. 89-1A-1, at 6-7 (1989) (admissibility of late-filed exhibit moot where document not relied on or considered in reaching decision; noting approval of Hearing Officer's directive that company resubmit initial brief without reference to proposed exhibit and without arguments related to exhibit); cf. MFS-McCourt, Inc., D.P.U. 88-229/252, at 9 (1989) (allowing inclusion in record of late-filed exhibits even though opposing party had not had opportunity to cross-examine the new evidence, because no prejudice to the moving party would result from admission).

Both OTELCO's Post-Order Motion and reply comments improperly include presentation of extra-record evidence in contravention of our agencies' procedural practices. This tactic is prejudicial to the rights of the other parties and violates basic administrative practice. Additionally, OTELCO's assertions have not been tested for their validity, as the company's entire argument and presentation of late-filed evidence is based on its own

interpretation of the DTC's Order. The time has long passed to adjudicate any further matter in the instant proceeding that was not raised in the initial complaint. Accordingly, the DTC must deny OTELCO's late-filed evidence, as well as the original Post-Order Motion.

Regarding the DTC's second inquiry, the DPU declines at this time to opine or effectively submit a legal brief on a matter that has not been properly adjudicated.

The DPU appreciates the opportunity to provide this sur-reply and the DTC's consideration. If you have any questions regarding this filing, please contact me at kerri.phillips@mass.gov.

Respectfully submitted,

/s/ Kerri DeYoung Phillips
Kerri DeYoung Phillips, Esq.
Department of Public Utilities

Enc.

cc: Service List (e-mail only)

**COMMONWEALTH OF MASSACHUSETTS
DEPARTMENT OF TELECOMMUNICATIONS AND CABLE**

CRC Communications LLC d/b/a OTELCO v.
Massachusetts Electric Company d/b/a National
Grid and Verizon New England Inc.

D.T.C. 22-4

CERTIFICATE OF SERVICE

I hereby certify that I have this day electronically served the attached sur-reply comments of the Department of Public Utilities upon the Service List for the above-captioned proceeding, in accordance with the requirements of 207 CMR 1.05.

Respectfully submitted,

/s/ Kerri DeYoung Phillips

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Dated: May 10, 2023